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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 259

CITIES SERVICE OIL COMPANY,
Petitioner,

against

PARK STEAMSHIP COMPANY, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARENT TEN EYCK, counsel on behalf of Cities Service Oil Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit dated, filed and entered April 11, 1951, (1) reversing the final decree of the United States District Court for the Southern District of New York, which ordered, adjudged and decreed that the libel herein be dismissed, with costs; and (2) remanding the cause to the United States District Court for the Southern District of New York for further proceedings in conformity with the Court of Appeals' opinion, rendered April 11, 1951.

Opinions Below

The opinion of the District Court (SAMUEL H. KAUFMAN, J.) (R. 360-374) is reported at 93 F. Supp. 201. The opin-

ion of the Court of Appeals (SWAN, *J.* with HAND, *C. J.* and FRANK, *J.*) (R. 382-387), is reported at 188 F. 2d 804.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1951 (R. 386). The issuing of that Court's mandate was delayed by the filing of a timely petition for rehearing, on April 26, 1951, which was denied by an order of the Court of Appeals dated and filed May 22, 1951 (R. 401). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Question Presented

A two voyage charter of the tanker "Clearwater Park" contained a "safe berth" clause of a type in common use. The Court of Appeals, reversing the District Court, has found that the petitioner (charterer) breached its obligation under the safe berth clause. To reach that result the Court of Appeals interpreted the clause to require that the charterer, rather than the vessel's owner, should bear the responsibility for a local pilot's negligence in anchoring the vessel, which resulted in her grounding. The Court of Appeals has held, in essence, that the charterer has failed to designate a berth of the sort of the clause required if the negligence of the owner's pilot, in seeking an anchorage spot, could and did injure the vessel.

Such interpretation of the "safe berth" clause is novel, as far as we know; and it is in derogation of the well-established doctrine that the owner of a time or voyage chartered vessel is responsible for her navigation.

Statement

The petitioner chartered the "Clearwater Park" from the respondent, its managing owner, for two consecutive voyages with cargoes of crude oil. The voyages were to be from a safe port in Venezuela to a safe port in the United States, north of Hatteras, Norfolk/Portland range, "at charterer's option, as ordered on signing bills of lading."

The charter party contained the following safe berth clause (R. 360):

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer * * *."

On both voyages the petitioner ordered the vessel to load at Las Piedras, Venezuela (R. 360, 363). On both voyages it ordered her to discharge at "Boston Harbor Hingham Bay Anchorage into Lighters" (R. 372). That, in terms, is the petitioner's designation of a discharging berth which has been held not to have fulfilled its safe berth covenant.

The District Court found (R. 372-373), and the Court of Appeals did not question: Hingham Bay is a small bay in the southeastern part of Boston Harbor; although it contains "a great deal of shallow water" the charts current when the vessel grounded "showed an anchorage area, with over 30 feet of water, approximately 2700 yards long on its north-south axis and 700 yards wide at the widest point on its east-west axis"; on the vessel's two arrivals in Boston Harbor, in December 1945 and January 1946, she was anchored by Mr. Cleverly, a local pilot, who had been

employed by the respondent; the "spot selected for an anchorage" on the vessel's first arrival "was dangerously close to shallow waters indicated on the then current charts", and the vessel touched bottom in those shallow waters; the "spot selected for an anchorage" on the vessel's second arrival "was dangerously close to shallow waters and shoal areas indicated on the then current charts", and the vessel grounded "on an uncharted rock at or about the spot where the then current charts indicated the presence of shoal areas"; and a "pilot, exercising reasonable care, could have anchored the Clearwater Park in Hingham Bay without exposing it to the danger of shallow waters or shoal areas."

The District Court's conclusions of law were (R. 373-374): the charterer's "designation of 'Boston Harbor Hingham Bay Anchorage' was a sufficiently precise designation under the terms of the charter"; a "fair construction of the charter" made the petitioner "responsible for all damages arising from reasonably foreseeable hazards at those spots in Hingham Bay where a vessel of the size, type and draft of the Clearwater Park would be anchored in the exercise of reasonable care"; both in December, 1945, and in January, 1946, Cleverly "did not exercise reasonable care in selecting the spots where the Clearwater Park anchored, as a result of which she touched bottom in December 1945 and grounded in January 1946"; and Cleverly's "faults are attributable to" the respondent.

The Court of Appeals disagreed (R. 383) with the District Court's opinion "that the charterer's designation of 'Boston Harbor Hingham Bay Anchorage' was a sufficiently precise" one, and "that Hingham Bay was a 'safe place' inasmuch as it contained areas where the vessel could have anchored without danger of grounding"; and it disagreed with that court's opinion that the charterer was not obliged

"to designate the exact spot where the vessel was to anchor".

Defining the question it deemed basic to decision the Court of Appeals wrote (R. 383):

> "The issue presented for decision is whether the charterer or the owner was obligated to select a safe berth for discharging into lighters in an area containing both safe and unsafe berths. The answer must be sought in the language of the safe berth clause, which permits the vessel to discharge at any one of three *loci* provided she 'can proceed thereto, lie at, and depart therefrom always safely afloat.' The three *loci* are 'any safe place or wharf, or alongside vessels or lighters reachable on her arrival.' Specifically the question is whether the word 'place' means the spot selected to drop anchor (plus the area over which the tanker may swing on a tide) when she is to discharge into lighters. Both the language and the purpose of the clause require an affirmative answer."

It is our position that the Court of Appeals erred in its formulation of the question to be decided, and adopted a clearly erroneous construction of the safe berth clause.

* * *

Analyzing the language of the clause, the Court of Appeals centered its attention on the word "place", observing:

> "The 'place' must be one 'at' which the vessel can lie. This is appropriate language to refer to her specific berth while at anchor, but is wholly inappropriate if 'place' is construed to include an area as large as Hingham Bay. Moreover, the natural meaning of 'safe place' is a place entirely safe, not an area only part of which is safe."

Continuing, the opinion invoked the *ejusdem generis* rule, stating: "Only a specific anchorage spot is the equivalent

of a berth at a wharf" (R. 384). Concluding, the opinion cited (R. 384, and footnote 1) precedents which have given the word "place", in safe berth clauses, "a spatially limited construction".

The Court of Appeals (R. 384) thought the purpose of the safe berth clause "also" supported the construction it adopted. Pointing out that the "most advantageous place" for discharging a tanker would be "a wharf at the refinery" the Court observed that, if discharge is into lighters, "the closer the ship can get to the refinery the less the cost of lighterage." The Court concluded that the charterer "bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice".[1]

Specification of Errors to Be Urged

The Court below erred:

(1) In failing to affirm the final decree of the District Court dismissing the libel.

(2) In ordering, adjudging and decreeing that said decree of the District Court be reversed with costs and the cause remanded for further proceedings in accordance with its opinion.

[1] The Court of Appeals found it immaterial (R. ~~386~~ 385) whether Cleverly, the pilot, was "employed" by the owner or the charterer, because it held that "the charterer had the duty to procure a specific anchorage" and was thus responsible for Cleverly's conduct as a "borrowed servant". Also, the Court of Appeals rejected the petitioner's contentions (R. ~~386-387~~ 385-386) to the effect that it was negligent omissions by the vessel's officers, rather than the petitioner's breach of the safe berth covenant (if breach were assumed), which proximately caused the groundings. We do not urge that its rulings in either of these respects raise questions so important or substantial as to justify certiorari. 526

Reasons for Granting the Writ

The Court of Appeals' interpretation of the safe berth clause has for the first time placed on a voyage charterer (and so, necessarily, on a time charterer as well), a responsibility with respect to the vessel's navigation.

It is well settled that the owner is not only generally responsible for a chartered vessel's navigation, through its servants, but has the specific duty of taking effective measures to avert impending danger not foreseen by a pilot, including the displacing of the pilot. *The China,* 74 U. S. (7 Wall.) 53; *Robins Dry Dock & Repair Co.* v. *Navigazione Libera Triestina,* 32 F. 2d 209 (C. C. A. 2); *City of Los Angeles* v. *Standard Transp. Co.,* 32 F. 2d 988 (C. C. A. 9); *The Hathor,* 167 F. 194; *The Leader,* 166 F. 139. It is clear that the berthing of a vessel is a part of her navigation. *The West Eldara,* 104 F. 2d 670 (C. C. A. 2); *The Niels R. Finsen,* 52 F. 2d 795 (S. D. N. Y.); *Luckenbach* v. *Insular Line,* 186 F. 327 (C. C. A. 2). Yet the Court of Appeals has here held that, if the charterer has ordered discharge (not at a wharf, whose qualities and potential dangers it can fairly be expected to know, but) alongside lighters in a known common anchorage area, in navigable water available to all vessels, the charterer is obligated to insure the owner against a local pilot's error of navigation in anchoring too close to surrounding shoals rather than well into available deep water.

As regards future charters, a charterer might try to protect itself by insisting on a safe berth clause which explicitly leaves the risk of such an error of navigation with the owner; but a charterer will be unprotected as regards outstanding charters, unless it has its own ship's officer, qualified in navigation, ready to board the chartered vessel whenever she arrives at a discharging port where the work of anchoring is commonly entrusted to a local

pilot. Indeed, the rationale of the Court of Appeals' decision will require the charterer to supervise all berthing, whether it is entrusted to a local pilot or accomplished by ship's personnel.

The Court of Appeals' decision places time charterers (as well as voyage charterers) in the difficult situation of having this particular responsibility of navigation, without practical means of discharging it. Time charterers, like voyage charterers have no control over a chartered vessel's navigation, and no control over those who are navigating her.

Furthermore, the decision is in derogation of the general rule that a voluntary pilot, taken aboard a vessel to navigate her in waters of which he has special local knowledge, is the servant of the shipowner, whose faults are imputed to the shipowner. *The Volund,* 181 F. 643, 666 (C. C. A. 2); *Bramble* v. *Culmer,* 78 F. 497, 504 (C. C. A. 4); *South Carolina State Highway Dept.* v. *United States,* 78 F. Supp. 598, 601. Thus, a shipowner cannot recover from others for damage to its vessel resulting from a voluntary pilot's fault. *The Oceanic,* 74 F. 642 (C. C. A. 5; cert. den. 163 U. S. 689). And a voluntary pilot renders the ship, or her owner, liable for damage caused (e.g., by a collision) to others as a result of his not properly anchoring her. *The Amiral Cecille,* 134 F. 673; *The Robert Rickmers,* 131 F. 638 (rev'd on other grounds, 142 F. 305).

Finally, the charter party contains the following general provision: "Nothing herein stated is to be construed as a demise Charter of the Vessel." It is, of course, well settled that the charterer under a demise charter, unlike the charterer under a time or voyage charter, does assume control of the vessel's navigation. It seems inescapable that a construction of the safe berth clause which imposes even one burden of navigation on the charterer makes the

charter "a demise Charter" to that extent. Thus, the Court of Appeals' construction of the safe berth clause defies the charter party's general injunction that nothing stated in it "is to be construed as a demise Charter of the Vessel."

* * *

First, as to the language of the clause, we do not doubt that the parties to a charter party can, by their contract, vary the normal rule of admiralty law as to the responsibility for a vessel's navigation; but we respectfully submit that a rule so well established, in the light of which countless charters are made, and countless policies of marine insurance written, should not be held to have been varied unless by clear, unequivocal language of the parties evidencing their intent to place a burden of navigation upon the charterer. It is our position that the language of the safe berth clause here in question does not do that, particularly when it is read in the light of the charter party's flat provision that nothing stated in it is to be construed as a demise charter.

We find no sound reason for, and ample reason against, the Court of Appeals' emphasis upon the use of the word "place" in the safe berth clause. As that court recognized (R. 383), the language of the clause "permits the vessel to discharge at any one of three *loci*"; always, of course, "provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat * * *". Those three *loci* are:

(1) "any safe place";

(2) "any safe * * * wharf";

(3) "alongside vessels or lighters reachable on" the vessel's "arrival".

As we see it, the clause gave the petitioner the option of choosing between three separate, and mutually exclusive, kinds of discharging berth. Thus, the petitioner was entitled to order, as it clearly did order, discharge at a berth of the third type: alongside lighters. The separable parts of the clause permitting designation of a safe place, or a safe wharf, were not resorted to in this case.

Refined analysis of the function and meaning of the words "place" and "wharf", in parts of the clause *not* called into play, is not calculated to develop the meaning of the clause as applied to the facts here presented. It seems to use that such analysis is a semantic exercise without bearing on the case.

Also, it seems to us that the argument (R. 384) from the use of the word "wharf", aided by the *ejusdem generis* rule (*i. e.*, that the petitioner was required to designate a "place" as specific as any "wharf" it might designate), is misconceived. The *ejusdem generis* rule "is not by any means a rule *required* by logic": The Origin and Logical Implications of the Ejusdem Generis Rule, by Glanville L. Williams, 7 The Conveyancer, N. S., 119. The key word in the caption of the clause is "berth". It is a generic term, of which the locutions "place", "wharf", and "alongside vessels or lighters" are specific instances. Williams writes (*id.*, p. 126) that when a wide genus is selected "the ejusdem generis rule may be deprived of some of its effect"; and he adds that there are circumstances in which the rule may be wholly deprived of its effect of cutting down the operation of general words. One such instance, Williams tells us, "is where the specific instances do not disclose a genus narrower than the general words themselves".

We think the problem of extracting the meaning of the part of the clause that *was* called into play is much simpler

than either of the courts below has thought. We think the meaning is clearly ascertainable simply by breaking the clause down with reference to the three kinds of *loci* whose designation as discharging berths was permitted. If that is so the question was, and is, simply whether the "Clearwater Park" *could* proceed to, lie at and depart from a berth alongside lighters in Hingham Bay Anchorage, always safely afloat.

The District Court's findings and conclusion of law (R. 373-374) to the effect that "the pilot did not exercise reasonable care in selecting the spots where the Clearwater Park anchored, as a result of which she touched bottom in December 1945 and grounded in January 1946", were, in all but the ultimate question of cause and effect, virtually adopted by the Court of Appeals when it wrote (R. 383): "Since the facts are set out at length in the district court's opinion, 93 F. Supp. 201, it will suffice here to say that on each occasion the vessel was piloted to Hingham Bay Anchorage by Pilot Cleverly, who selected the spot where the anchor was dropped and negligently anchored too close to shoal water, and on each occasion the vessel grounded." The District Court also found (R. 373) that a "pilot, exercising reasonable care, could have anchored the Clearwater Park in Hingham Bay without exposing it to the danger of shallow waters or shoal areas"; and the Court of Appeals expressed no disagreement with that finding.

We think it follows that, on the record here presented, the vessel could have lain at a berth alongside lighters in Hingham Bay, always safely afloat; and if that is so the language of the safe berth clause, properly interpreted, did not require the petitioner, through Cleverly, to select an exact spot to drop anchor which should be unconditionally safe.

• • •

Second, as to the purpose of the clause, we find no support for the Court of Appeals' view (R. 384) that the charterer "bargains for the privilege of selecting the precise place for discharge".

It is true that the ideal place for discharging a tanker would be a wharf at the refinery; but, for reasons which were disclosed at the trial (R. 175-177), the petitioner did not have the use of its own tanker dock, near Boston. Thus, it was obliged to order discharge into lighters. It is also true, as the Court of Appeals noted (R. 384) that, if discharge is into lighters, "the closer the ship can get to the refinery the less the cost of lighterage".

But this is true only within limits. In the case of a deep water anchorage area 2,700 yards long and 700 yards wide at its widest, where because of variations in the width "the entire length was not available as an anchorage for a vessel of the size of the Clearwater Park" (R. 367), it made no real difference to the charterer whether the vessel was anchored in one particular spot or another, within the available safe area. We think it is clear, as the District Court wrote (R. 367), regarding the commercial value of "the privilege of designating the exact spot for discharge", that "in the instant case no possible economic benefit could accrue to respondent [petitioner here] from such a privilege; for its purposes, any place in Hingham Bay was of equal value".

* * *

Our petition is based squarely on the contentions: first, that the Court of Appeals has misinterpreted the safe berth clause; second, that it has established a novel and unworkable exception to the deeply rooted doctrine of admiralty law concerning the responsibility for a time or voyage chartered vessel's navigation; third, that the ex-

ception thus established importantly affects the interests of voyage and time charterers in general, as well as the interests of their marine insurance underwriters; and fourth, that such a departure from the doctrine of the owner's responsibility for a vessel's navigation should be made, if at all, only by this Court.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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The opinion of the District Court (R. 360-74) is reported at 93 F. Supp. 201. The opinion of the Court of Appeals for the Second Circuit (R. 382-6) is reported at 188 F. 2d 804.

Jurisdiction

The jurisdictional requisites are adequately stated in the petition.

Question Presented

There is no question of responsibility for navigation, nor any question of responsibility for a pilot's negligence. This is a safe berth case. The question presented can best be stated in the language of the Court of Appeals:

> "The issue presented for decision is whether the charterer or the owner was obligated to select a safe berth for discharging into lighters in an area containing both safe and unsafe berths" (R. 383).

The answer is to be found in the words of this charter as applied to the facts of this case.

Statement

Petitioner chartered respondent's steamship CLEARWATER PARK, a tanker, for two consecutive voyages from a safe port in Venezuela, to be named, to "One safe port U. S. North of Hatteras, Norfolk/Portland Range, at charterers option, as ordered on signing Bills of Ladings".

In addition to the Safe Port Clause just quoted the charter contained the following Safe Berth Clause:

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to the next berth, wharfage and dockage charges at that berth, additional agency charges and expense, customs overtime and fees, and any other extra port expenses incurred by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in WSA Rate Orders and Rate Advices."

As the District Court found, on both voyages petitioner

> " * * * ordered the CLEARWATER PARK to load at Las Piedras, Venezuela and designated 'Boston Harbor Hingham Bay Anchorage into lighters' as the place and manner of discharge * * * " (f. 1080).

Despite its duty under the Safe Berth Clause to "designate and procure" a safe discharging "wharf" or "place", petitioner failed to give any more explicit instructions but left respondent to find a safe berth within Hingham Bay as best it might. On each voyage the place where the vessel dropped anchor was chosen by Pilot Cleverly who, respondent claimed, was hired by petitioner for that purpose, which petitioner denied. It was agreed, however, that Pilot Cleverly was "the Hingham Bay specialist" (R. 121).

On each voyage the vessel was navigated to the point where she dropped anchor without incident. On the first voyage she remained safely at anchor from the morning of December 17, 1945 until the night of December 19-20 when she dragged anchor in a moderate gale because the bottom at that point was poor holding ground, and struck bottom suffering damage (R. 361-2, 385). On the second voyage she remained safely at anchor from about 5:00 p. m. until about 9:45 p. m. on January 11, 1946 when it was discovered that she had, on the falling tide, settled on an uncharted rock, suffering additional damage (R. 364-6, 385).

Reasons For Denying the Writ

No Conflict of Decisions is Involved

Petitioner does not attempt to show any conflict between the decision below and any other decision. There is no conflict.

The decision below is simply the converse of the Court of Appeals' decision in *Cities Service Transp. Co.* v. *Gulf Refining Co.*, 2 Cir., 79 F. 2d 521, affirming *per curiam* *The Halo*, 9 F. Supp. 963, S. D. N. Y. In that case the present petitioner, owner of the HALO, sued Gulf Refining Company, charterer, for damage suffered by the HALO in an unsafe berth designated by the charterer. The charter clause closely resembled that at bar. The Circuit and the

District Courts held the charterer for designating an unsafe berth. Here petitioner's liability flows from an equivalent failure to "designate and procure" a safe berth.

In *Crisp* v. *United States & Australasia S. S. Company,* 124 Fed. 748, S. D. N. Y., the charterer was held for failing to provide a safe berth because it sent the ship to a berth beyond a bridge through which she was too wide to pass.

In *Constantine & Pickering S. S. Company* v. *West India S. S. Company,* 199 Fed. 964, the charter provided that the vessel should proceed "to such anchorage or safe dock to discharge cargo as ordered by consignee. Steamer, however, to lie always afloat" (p. 965). The vessel anchored at the point designated by charterer and grounded there. The charterer was held liable for breach of its safe berth covenant. Its liability was for half damages only, the ship's officers being held mutually to blame.

Here the District Court and the Court of Appeals, although urged by petitioner to do so, could find no negligence on the part of the officers or of the crew of the vessel.

In *Smith* v. *Burnett,* 173 U. S. 430, where the appellant was at once charterer and wharfinger of the vessel, he was held for the damage sustained when the vessel grounded in her berth, designated by appellant, because of appellant's failure to provide a safe berth.

Cases where liability has been decreed for failure to provide a safe berth are numerous. *P. Dougherty Co.* v. *Bader Coal Co.,* 244 Fed. 267, D. C. Mass.; *Merritt* v. *Sprague,* 191 Fed. 627, D. C. Maine; *The William L. Hooper,* 28 F. Supp. 770, D. C. N. J.; *Carroll et al.* v. *Holway,* 158 Fed. 328, D. C. Maine; *Eastern Mass. Street R. Co.* v. *Transmarine Corporation et al.,* 1 Cir., 42 F. 2d 58; *Cities Service Transportation Company* v. *Hartol Products Corporation,* 1936 A. M. C. 1703; *Nassau Sand & Gravel Co. Inc.* v. *Red Star Towing & Transportation Co. Inc. et al.,* 2 Cir., 62 F. 2d 356.

No Question of General Interest is Involved

The most important words in the Safe Berth Clause, "designate and procure", are not found in time charters or in any common form of charter for dry cargo vessels. They are found only in the revised form of the Warshipoilvoy charter. The revision of Warshipoilvoy containing these words was promulgated effective November 1, 1945. 10 F. R. 13454, 1945 Supp. to Code of Fed. Reg., Title 46, Sec. 303.2. However, this form was deleted from the Code of Federal Regulations in 1948, presumably being obsolete. 13 F. R. No. 246, p. 7866-7, December 18, 1948.

Although Warshipoilvoy was used throughout World War II no other suit arose, so far as we know, under the Safe Berth Clause and, so far as we know, no other suit is pending which will or can be affected by the decision below.

Nothing is at stake except petitioner's liability for the groundings of the CLEARWATER PARK in December, 1945 and January, 1946.

If tanker charterers, most of whom are also shipowners, do not like the Court of Appeals' decision, of which we have seen no evidence, the form of the clause can quickly and readily be changed. New York is the center of the world-wide tanker market and such a change could be accomplished practically overnight.

No Question of Navigation is Involved

On each voyage the vessel had ceased navigating and had been at anchor for a substantial time before grounding and sustaining the damage sued for. On the first voyage she was at anchor 36 hours before she dragged to a shoal spot. On the second voyage she was at anchor about 5 hours before she settled on an uncharted rock on the falling tide (District Court opinion, ff. 1083-5, 1092-6).

Thus on neither voyage was the damage sustained either while navigating or because of the manner in which she was navigated. Both groundings resulted from inherent characteristics of the berth in which she lay; on the first voyage, poor holding ground; on the second voyage, an uncharted rock.

It follows that the decision below does not in any degree minimize the shipowner's responsibility for navigation, or pass to the charterer any responsibility therefor. It is consistent with the decision below that the shipowner must navigate his vessel to destination, albeit the charterer has covenanted to "designate and procure" that destination by naming a berth which must be safe.

Even if the designation of the berth, the destination, could be deemed a part of the navigation toward that destination there would be no difference in the result. It is consistent with maritime practice in charter and other situations for the parties, by agreement, to pass from one to the other the onus of specific aspects of navigation. In *Crisp* v. *United States & Australasia S. S. Co.*, 124 Fed. 748, S. D. N. Y., almost half a century ago the charterer was held for a pilot's negligence in attempting to navigate the vessel through a bridge too narrow her her, this being in breach of the charterers' safe berth covenant. In *Sun Oil Company* v. *Dalzell Towing Co., Inc.*, 287 U. S. 291, this Court sustained a clause passing from the tugowner to the shipowner responsibility for the tug captain's negligence when acting as pilot. In *Robbins Drydock and Repair Company* v. *Navigazione Libera Triestina, S. A. and Moran Towing and Transportation Company, Inc.*, 261 N. Y. 455, and *Moran Towing & Transportation Co., Inc.* v. *Navigazione Libera Triestina, S. A.*, 2 Cir., 92 F. 2d 37, *certiorari denied* 302 U. S. 744, it was made clear that such agreements would be enforced as between the parties thereto, although not binding upon third parties. In *The Endsleigh*, 124 Fed. 858, S. D. N. Y., a charter clause required the charterer to

provide and pay for all fuel for the vessel and the Court held that, although the procurement of fuel was generally for the shipowner, by reason of the clause mentioned, the charterer became responsible for the master's errors in procuring fuel. In *The Santona*, 152 Fed. 516, S. D. N. Y., a charter clause required the charterer to tally and receipt for cargo and the Court held charterer liable for the mate's errors in this respect although the tallying and receipting for cargo would, without the charter clause, be the shipowner's obligation.

If there were any conflict between the Safe Berth Clause and the clause in the printed form providing that the charter should not be deemed a demise, the Safe Berth Clause would, on familiar principles of construction, take precedence, it being typewritten.

The Decision Below is Right

The Safe Berth Clause required respondent to send its vessel to "any safe place or wharf" for discharge "which shall be designated and procured by" petitioner. Petitioner designated Hingham Bay as the discharging place, an area about 2700 yards long and about 700 yards wide. The option accorded petitioner of ordering the vessel to discharge "alongside vessels or lighters reachable on her arrival" is of no moment because it was not exercised. On both voyages lighters were sent to the vessel after she had anchored. As the District Court found, discharge into lighters was not the place but was the "manner of discharge" (ff. 1080-1).

The general designation of an area, irregular in shape, 2700 yards long by 700 yards wide, part of which was unsafe because of shoal spots, some of which were known but the shallowest of which was unknown, was not compliance with petitioner's covenant. The juxtaposition of "place" and "wharf" confirms that "place" means a spot, the equiva-

lent of a berth at a wharf, not an area. The purpose of the "place" is the same as the purpose of a berth at a "wharf", i.e. to enable the vessel to lie still there and discharge her cargo. She was not expected to discharge all over Hingham Bay; rather she was expected to drop anchor at one spot and stay there until discharging was finished.

This construction is supported by the *ejusdem generis* rule and by the interpretation put upon a similar clause by the British Court of Appeal in *Stag Line Ltd.* v. *Board of Trade,* 84 Ll. L. 1.

If respondent's vessel had grounded at a wharf designated by petitioner, petitioner would surely be liable for the ensuing damage. *Cities Service Transp. Co.* v. *Gulf Refining Co.,* 2 Cir., 79 F. 2d 521. Why should petitioner's liability be any less when the vessel was damaged at a "place" rather than at a wharf?

The commercial reason for the Safe Berth Clause has great weight. The cargo belonged to petitioner, who had use for it at a particular refinery and had to arrange to receive it from the ship. Here, as elsewhere, cost is a factor. The closer the ship comes to the refinery the less is the cost of lighterage, which is for petitioner's account. Despite what petitioner says (Petition p. 12) its witness expressly admitted that the nearer the vessel anchored to petitioner's plant at East Braintree the less expense petitioner would incur (ff. 553-4). For this sound economic reason petitioner reserved the right to designate either a "wharf", or a "place" other than a wharf, for discharging. Respondent gave up its right to determine at what place or wharf its vessel would discharge. In return, as consideration therefor, petitioner covenanted to "designate and procure" a "place or wharf" which would be safe. In this light it is obvious that the privilege of designating an area would meet neither petitioner's nor respondent's requirements. If petitioner could not direct the

vessel to the anchorage spot nearest to East Braintree respondent, by anchoring further away, could put petitioner to needless expense. On the other hand, what does it profit the shipowner to surrender the right to select the "wharf" or "place" if the charterer need designate only an area 2700 yards by 700 yards, not all of which is safe because of shoal spots, some known but the shallowest unknown?

It is inescapable that petitioner, having contracted for the privilege of designating the precise spot, assumed the correlative duty of designating the precise spot and a safe one. Both courts have found that the anchorage places were unsafe.

Even if the Safe Berth Clause could properly be construed to apply to an area rather than to an individual "place" of anchorage, it follows necessarily that petitioner's covenant of safety must apply to the whole area. There is nothing in the language of the clause that lessens its scope if the "place" designated be larger than a berth. On the contrary, the safety covenant applies with equal force whether the vessel be sent to discharge at a "wharf" or at a "place" no matter how large the "place" may be.

Conclusion

The decision below is correct. There is no question of general interest and no conflict exists. It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

EUGENE UNDERWOOD
Counsel for Respondent
27 William Street
New York 5, N. Y.

Dated: New York, N. Y.
September 7, 1951.

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Office Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 259.

CITIES SERVICE OIL COMPANY,

Petitioner,

against

PARK STEAMSHIP COMPANY, LTD.

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A., respectfully move this Court, pursuant to Rule 27, Paragraph 9, for leave to file a brief as *amici curiae* in support of the petition for *certiorari* filed August 20th, 1951. The petitioner has consented to the filing of such brief but respondent refused its consent.

The interest of the proposed *amici curiae* is that all or a considerable part of their business involves the chartering of vessels under charters containing so-called "Safe Berth Clauses" similar to that here involved. Thus the decision below seriously affects them and, it is believed, the whole of the maritime industry engaged in the chartering trade or shipping goods under charter.

The *amici curiae* seek through the filing of a brief to emphasize the importance of the question here involved and point out additional reasons why it should be reviewed.

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The Question Presented.

The question is whether a charterer having no control over the operation or navigation of a vessel is to be held responsible to the vessel owner for damage to the vessel caused by the acts, in this case the negligence, of a pilot employed by the owner in improperly anchoring the vessel in an anchorage designated by the charterer in which there admittedly was ample safe anchoring ground. The court below, reversing the District Court, has so construed the so-called "Safe Berth Clause" in question as to render the charterer liable for the improper selection by the owner's pilot of the precise spot within the anchorage at which to drop anchor. In doing so the court shifted the responsibility of a shipowner for the navigation of a vessel to the charterer.

The Facts.

As is customary under all voyage and time charters, the charterer designated the location at which the vessel was to discharge her cargo. In the present instance the charterer designated the Hingham Bay Anchorage in Boston Harbor for discharge into lighters. The vessel owner employed a pilot to take the vessel to this anchorage. Admittedly Hingham Bay contains about half a square mile of safe anchoring ground but around this area there are some shallow waters. However, on two successive occasions the pilot employed by the shipowner selected a spot at which to drop anchor dangerously close to shallow water and shoals. On both occasions the vessel touched bottom. In January 1946, the second occasion, the vessel grounded on an uncharted rock at a spot where the charts indicated

the presence of shoal areas and sustained the damage sued for.

No one challenges the finding of the district judge that:

> "A pilot, exercising reasonable care, could have anchored the *Clearwater Park* in Hingham Bay without exposing it to the danger of shallow waters or shoal areas."

In view of the above finding there would appear to be no doubt that the charterer had complied with the charter requirements, which provided:

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer * * *".

The Importance of the Question.

It is submitted that the duty of a charterer under the usual "Safe Berth Clause" such as that here involved is merely to designate an anchorage in which the vessel can be safely anchored, unless, of course, discharge is to be at a berth alongside a dock. Such we believe has always been the understanding and practice in the chartering trade generally.

When it is considered that under charters such as this the shipowner has the obligation to perform all matters in connection with the operation and navigation of the vessel, it does violence to the obvious and basic intent of the parties to put on the charterer responsibility for any part

of the ship's operation or navigation as the court below has done.

In the case of a charter, other than a demise, it has always been understood that matters of operation and navigation were the duties of the owner. This court, in *New Orleans, etc.* v. *U. S.*, 239 U. S. 202, said at page 206:

> "* * * We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. * * *"

Again, in *U. S.* v. *Shea*, 152 U. S. 178, p. 187, this court, quoted from its decision in *Leavy* v. *U. S.*, 14 Wall. 607, as follows:

> "* * * All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

In *Bramble et al.* v. *Culmer, et al.*, 78 Fed. 497, the Circuit Court of Appeals for the Fourth Circuit said at page 503:

> "The result of all the cases seems to be this: Wherever the shipowner undertakes to act as carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests upon

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him; but wherever the ship is completely transferred to the hirer for a period of time, and the shipowner has nothing whatever to do with the appointment of her officers and crew, then the charterer becomes responsible for her navigation. No case has been cited, and our researches have not disclosed any, where the mere appointment of a pilot has been held to operate so as to change legal ownership and responsibility. The pilot is considered as the servant or agent of the owner. The fact that he was selected and paid by the charterers cannot alter his relations to the ship."

Thus it appears that the decision of the court below in the respect indicated is in conflict not only with the general line of authorities, but decisions of this Court and the courts of appeals of other circuits.

Anchoring a vessel in a designated area certainly is an act performed in the navigation of the vessel. Thus, if the charterer's right to say where the vessel shall discharge carries with it the duty to pin-point the spot in a given anchorage in which a vessel must drop her anchor, the owner has surrendered control of the vessel for the time being, contrary to the underlying intent of all charters of this kind and the express provision in this charter that: "Nothing herein stated is to be construed as a demise charter of the vessel."

Like most anchorages the one in question was open to the public. In such anchorages the available spots for anchoring depend on the presence or absence of other vessels when a vessel is ready to anchor. However, under the holding of the court below, a charterer, who must give its instructions in advance of the vessel's arrival, must somehow foresee what vessels will be present in the anchorage

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and where each will be. Otherwise the charterer must put a navigator on board to determine the exact spot at the moment the vessel reaches the anchorage or, in effect, borrow the shipowner's pilot or ship's officers for that purpose.

The decision of the court below is, we submit, wholly unrealistic and will cause confusion in the chartering trade and will put unexpected and serious burdens not only on charterers but also on merchants and the government in shipping bulk cargoes on charter party terms, a common method of shipping.

From earliest times, for sound economic reasons, shipowners have been protected against disastrous results which would often follow error in navigation by the limitation of liability laws of this and most maritime nations. But our Limitation of Liability Statutes (46 U. S. Code, Sec. 182 seq.) give the benefit of limitation only to shipowners and demise charterers, that is, charterers who actually man, victual and navigate vessels. Therefore, the putting of responsibility for the navigation and operation of a vessel on a time or voyage charterer, even for a brief period, could be ruinous to the charterer if a serious disaster ensued.

If the decision of the court below be carried to its logical extreme, not only a pilot, but the ship's officers and crew would be considered the borrowed servants of the charterer in anchoring in an anchorage or other location designated by a charterer. Indeed, it may lead to many extremes. What if the navigator overshoots the anchoring spot? Is he still the charterer's servant as he navigates around the bay to again come into the anchorage? What if the charterer designates a berth alongside a dock but the navigator negligently collides with the dock? Where is the line to

be drawn between activities of the pilot, master or navigator as servant of the owner and as servant of the charterer? These considerations emphasize the danger of tampering with the established law and practice that the navigation of the vessel at all times remains with the owner, and the importance to the trade that this court review the decision below which lays open to question the hitherto well settled delineation of the obligations as between owner and charterer with respect to navigation and operation of the vessel.

Indeed, the decision of the court below, if given its logical implications, would apply the borrowed servant doctrine to impose upon a contractor liability for the negligence of servants of the other party to a contract in obeying general and proper instructions which the contractor was entitled to give and which it was the right and duty of the other party to the contract to perform with servants entirely under his control. The implications of such a doctrine are startling. For instance, in the case of government construction contracts the government's officers usually have the right to give general directions to contractors. Can it be that such right imposes a liability on the government for damage due to the negligence of the contractor's servants in performing government orders which were quite capable of being performed without damage if due care had been used?

It is not an answer to these serious consequences to say that charterers can require changes in the clause or may insure the risks of such consequences. It is common knowledge that often time charters are for a period of years and not subject to early change. Indeed such clauses are in standard forms in the hands of ship brokers, shipowners and charterers all over the world and may not be easily changed. Furthermore, the charter here contained an

express provision that nothing in it should be construed as a "demise" of the vessel. What more can be provided by changing the language of the charter?

Similar clauses are not only found in the great majority of charters but also in standard forms prepared by and in use by the government as charterer. Several such clauses are noted in an appendix hereto.

As to insurance, it is obvious that the costs to the charterer would far exceed the costs to an owner whose liabilities may be limited under existing limitation of liability statutes. Indeed, the new and unlimited risks of liability which the decision below puts on charterers may well render insurance costs prohibitive.

It is submitted the decision of the court below puts heavy, new and unintended burdens on charterers including the United States Government and will result in confusion in the chartering trade and beget litigation. It is therefore of utmost importance that it be reviewed by this Court.

Wherefore, the movants respectfully pray that they be permitted to file a brief as *amici curiae* in support of the petition for *certiorari*.

Dated, New York, N. Y., August 31st, 1951.

Respectfully submitted,

L. DEGROVE POTTER,
Counsel for States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A.

WALTER P. HICKEY,
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 259.

CITIES SERVICE OIL COMPANY,

Petitioner,

against

PARK STEAMSHIP COMPANY, LTD.

Respondent.

CONSENT OF PETITIONER.

The petitioner hereby consents to the filing of a brief as *amici curiae* by States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A.

BARENT TEN EYCK,
Counsel for Petitioner.

Dated, New York, August 31, 1951.

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APPENDIX

List of "Safe Berth" Clauses in Certain Other Forms of Charters

1. Probably the most widely used commercial form of time charter for dry cargo vessels is the so-called "Government Form" approved by the New York Produce Exchange, which provides:

> "6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground." *Poor* on *Charter Parties and Ocean Bills of Lading*, page 265.

2. During World War II, the government chartered practically all the ocean-going tankers and dry-cargo vessels in the American merchant marine under time charters each containing the following provision:

> "Clause 15. Cargo may be laden or discharged in any dock or at any wharf or place that the Charterer or its agents may direct, provided that the Vessel can safely lie afloat at any time of tide." See "Warshiptime, Form 101" (7 Fed. Reg. 3546); "Warshiptime Rev." (9 Fed. Reg. 3773); "Warshipoiltime" (7 Fed. Reg. 6551); "Warshipoiltime (Rev.)" 9 Fed. Reg. 3787. Also see generally Title 46 Code of Federal Regulations, Ch. III, Parts 302 and 303.

3. Likewise during World War II the government prescribed various forms of voyage charters both for tankers and dry-cargo vessels. Some of these forms are still in use by various government agencies, such as General Services Administration and Economic Cooperation Administration.

The government form "Warshipoilvoy", (7 Fed. Register 4386), contains the provision:

> "6. (a) SAFE BERTH. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and secured by the Charterer, any lighterage being at the expense, risk and peril of the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. * * *"

In the "Warshipvoy, (Revised)" (9 Fed. Reg. 9290) form of voyage charter for dry-cargo vessels, the following provisions appear:

> "4. LOADING BERTH.—a) The cargo described in Part I shall be loaded on the Vessel at such berth or berths that the Charterer may designate, always, however, subject to the approval of the War Shipping Administration. * * *
>
> b) The Charterer warrants that such berth or place as may be designated by him shall be safe in all respects. Unless expressly provided in Part I that the Vessel may load safely aground, the Charterer warrants that such berth or berths shall have sufficient depth of water at all times and stages of tide to accommodate safely a vessel of the size and particulars designated in Part I hereof and that the Vessel can proceed to, remain thereat, and depart therefrom always safely afloat.
>
> * * * * * *
>
> "9. DISCHARGING BERTH.—a) Cargo will be discharged at the berth or berths that the Charterer designates, always subject, however, to the approval of the War Shipping Administration. * * *
>
> * * * * * *
>
> b) The Charterer warrants that such berth or place as may be designated by him shall be safe in all respects. Unless expressly provided in Part I

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that the Vessel may discharge safely aground, the Charterer warrants that such berth or berths shall have sufficient depth of water at all times and stages of tide to accommodate safely a vessel of the size and particulars designated in Part I hereof and that the Vessel can proceed to, remain thereat, and depart therefrom always safely afloat.

* * * * * *

4. The very recent "Time Charter Party—War Risk Revision," issued July 7, 1950 by the Navy for Military Sea Transportation Service of the Department of the Navy under which the Government, has chartered considerably more than a hundred merchant vessels for Korean service, provides as follows:

"(8). The cargo or cargoes shall be laden and discharged in any dock or at any wharf, place or open roadstead that the Charterer may direct, provided the Vessel can lie always safely afloat at any time of tide except at such places where it is customary for similar sized vessels to lie safely aground. * * *"

5. The Americanized Welsh Form (revised August 1939) provides in part:

"1. * * * and being so loaded, shall therewith proceed, with all possible dispatch, to ..... or so near thereunto as she can safely get, and there deliver her cargo alongside any Wharf, and/or Vessel and/or Craft, as ordered, where she can safely deliver, always afloat, * * *."

6. The "FOSFO" Phosphate Charter Party provides in part:

"* * * and shall therewith proceed to ..... as ordered on signing Bills of Lading and there deliver the same, in accordance with the custom of the port, at such wharves, piers or jetties or in such docks or into lighters as may be ordered by the Charterer or its agents or nominees * * *."

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Office Supreme Court, U. S.
FILED
SEP 13 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 259

CITIES SERVICE OIL COMPANY,

Petitioner,

against

PARK STEAMSHIP COMPANY LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The intending *amici* fail to comply with Rule 27, Paragraph 9(c). The motion is not, in the words of the rule, "independent of the brief." It is an argument, filed without leave, in support of the petition.

No attempt is made by the intending *amici* to show, as required by Rule 27, Paragraph 9(c), that there are questions of law that have not been, or will not be, adequately presented by the parties. Counsel for petitioner are experienced members of the admiralty bar.

It does not appear that the intending *amici* have any interest in the question presented. The question turns upon the words "designated and procured" in the charter between petitioner and respondent, which involved a tank

ship, and which words are peculiar to charters involving tankers. They are not to be found in the clauses printed in the Appendix to the motion. It does not appear that the intending *amici* have any interest in vessels other than dry cargo vessels. An examination of available records does not disclose that the intending *amici* either own or charter tankers. To what extent they charter dry cargo ships is unknown, but the interest of at least two of them appears to be as owners of such vessels rather than as charterers. From the current issue of Lloyd's Register of Shipping it appears that States Marine Corporation owns and operates 21 dry cargo ships and that Flota Mercante Grancolombiana, S. A. owns and operates at least 8 dry cargo ships.

Nothing is at stake in this case except petitioner's liability for the damage sustained by respondent's vessel. This turns upon the peculiar words of the charter, to which only petitioner and respondent were parties, and upon the peculiar facts of the two groundings. No question of general interest is involved.

For the foregoing reasons the motion of States Marine Corporation *et al.* for leave to file a brief as *amici curiae* should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent.

Dated: New York, N. Y.
September 10, 1951.